Supreme Court, U.S.
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NO. 95-327

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SILVER ROSE ENTERTAINMENT, INC., A FLORIDA CORPORATION, ET AL.,

Petitioners,

vs.

CLAY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RESPONDENT CLAY COUNTY'S BRIEF IN OPPOSITION

MARK H. SCRUBY
County Attorney
Counsel of Record

Post Office Box 1366
Green Cove Springs, Florida 32043
(904) 269-6377

Attorney for Respondent Clay County

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict exists between the decision for which review is sought and the decision of the Supreme Court of Connecticut in *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981), within the meaning of Rule 10.1(b), Rules of the Supreme Court.

2. Whether the Supreme Court of the United States should grant a petition for a writ of certiorari to review a decision of the First District Court of Appeal of the State of Florida that Section 3-2 of the Clay County Code, Clay County, Florida, prohibiting the sale of alcoholic beverages on Christmas, does not on its face violate the establishment clause of the First Amendment to the Constitution of the United States.

3. Whether the equal protection issue asserted by the Petitioners in their petition for a writ of certiorari was timely and properly raised in the state court proceedings so as to give the Supreme Court of the United States a jurisdictional basis to review by writ of certiorari a decision of the First District Court of Appeal of the State of Florida.

4. Whether the Supreme Court of the United States should grant a petition for a writ of certiorari to review a decision of the First District Court of Appeal of the State of Florida, which decision the Petitioners assert to have definitively and affirmatively held that Section 3-2 of the Clay County Code, Clay County, Florida, prohibiting the sale of alcoholic beverages on Christmas, does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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ORDERS AND OPINION BELOW

In the trial court, the circuit judge of the Fourth Judicial Circuit, Clay County, Florida, entered an unreported order denying plaintiffs' motion for temporary injunction on December 22, 1993 (P.A. at A-1). On December 23, 1993 the First District Court of Appeal of the State of Florida entered an unreported order denying an emergency petition for writ of mandamus or, alternatively, for order reversing the lower court's denial of motion for temporary restraining order [sic] or, alternatively, for an order granting temporary restraining order. Subsequently the First District issued an opinion affirming the trial court's order on November 22, 1994 (P.A. at A-12). This opinion is reported as *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d 246 (Fla. 1st DCA 1994). The Supreme Court of Florida issued an order denying review of the First District's opinion on April 12, 1995, reported at ___ So. 2d ___ (Fla. 1995) (P.A. at A-38).

A review of the First District's opinion reproduced by the Petitioners in the appendix to their petition for a writ of certiorari reveals at least one typographical error (P.A. at 21) and one omission of substance (P.A. at 27). A correct rendering of the text of the First District's opinion with regard to the error and the omission is set forth in the reported decision *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 249 and 251, respectively.

JURISDICTION

Nowhere in the Petitioners' jurisdictional statement is mention made regarding any federal question arising under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Yet much of the

reasoning being urged upon the Court to issue a writ of certiorari digresses into putative equal protection concerns. The Respondent County (the County) submits that, in addition to the several reasons that the Court should decline jurisdiction set forth elsewhere in this brief in opposition, the Petitioners' failure to identify equal protection in their jurisdictional statement should preclude contemplation of equal protection *ab initio*. Otherwise, the County does not dispute the Petitioners' rendering of the jurisdictional grounds under which the Supreme Court may grant their petition.

The only decision which can be reviewed under 28 U.S.C. § 1257 is *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d 246 (Fla. 1st DCA 1994). The County agrees that the First District's decision is from a state court of last resort within the meaning of Rule 10.1(b), Rules of the Supreme Court. The County does not agree that Rule 10.1(b) has application to the jurisdictional question in that *Silver Rose Entertainment* does not conflict with the decision of another state court of last resort.

ADDITIONAL CONSTITUTIONAL PROVISION AND RULES INVOLVED

In addition to the constitutional provisions, statute, ordinance and rule set forth in the petition for a writ of certiorari, the County submits that the following constitutional provision and rules are involved in this case:

U.S. CONST. amend. XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of

intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Rule 14.1(h), Rules of the Supreme Court:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

Rule 15.1, Rules of the Supreme Court:

> A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in

> opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition. (emphasis as in original)

STATEMENT OF THE CASE

The Petitioners' statement of the case is an unfortunate olio combining large measures of argumentative material, irrelevant assertions, and substantial inaccuracies with small portions of information suitable to a statement of the case. Moreover, the Petitioners' statement of the case omits any information regarding the federal questions sought to be reviewed as required under Rule 14.1(h), Rules of the Supreme Court.

In accordance with Rule 15.1, Rules of the Supreme Court, the County must identify material misstatements of fact asserted in the Petitioners' statement of the case. First,

the assertions in the first paragraph and in the second and third sentences of the second paragraph of the statement are false because nowhere in the trial court or before the First District did the Petitioners raise or argue any equal protection issue. Second, the fourth paragraph is argumentative and addresses only non-federal questions. Third, the last sentence of the fifth paragraph is argumentative and mischaracterizes the establishment clause issue. Because the Petitioners' statement of the case is rife with misstatement and argument, the County rejects said statement in its entirety and submits the statement set forth below.

The Petitioners comprise a group of commercial establishments licensed to sell alcoholic beverages in Clay County, Florida. In December, 1993, the Petitioners filed a civil action in the Circuit Court of the Fourth Judicial Circuit of Florida, naming the County and the Respondent Sheriff of Clay County as defendants. The complaint alleged that the portion of Section 3-2 of the Clay County Code prohibiting the sale of alcohol on Christmas violates the establishment clause of the First and Fourteenth Amendments to the Constitution of the United States. The Petitioners sought injunctive and declaratory relief (R.A. at A-1).

Following a hearing on the Petitioners' verified motion for temporary injunction and memorandum of law (R.A. at A-7) the circuit court entered its order denying plaintiffs' motion for temporary injunction (P.A. at A-1). The Petitioners sought immediate review by the First District, filing a notice of appeal together with an emergency petition for writ of mandamus or, alternatively, for order reversing the lower court's denial of motion for temporary restraining order [sic] or, alternatively, for an order granting temporary restraining order. By unreported order of the First District

dated the next day, this emergency petition was denied without prejudice to the right of the Petitioners to pursue their appeal of the circuit court's order of denial as a non-final order under the applicable rules of appellate procedure. *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 247-48, (P.A. at A-15-16).

In due course the issue was briefed and argued before the First District. Although the proceeding concerned a non-final order, at oral argument before the First District the Petitioners proposed that the court rule on the constitutional issue on the merits and as a matter of law. The County agreed it was willing to have the First District decide, as a matter of law, whether Section 3-2(c) of the Clay County Code on its face violated the establishment clauses of the state and federal constitutions. *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 248, (P.A. at A-17-18). The establishment clause was the only issue properly before the trial court and the First District. The First District issued its written opinion on November 22, 1994, upholding the constitutionality of Section 3-2(c) of the Clay County Code.

The Petitioners timely filed their notice to invoke the discretionary review jurisdiction of the Supreme Court of Florida on December 22, 1994. The court denied review by order dated April 12, 1995 (P.A. at A-38).

The Petitioners timely filed their petition for a writ of certiorari in the Supreme Court of the United States on July 11, 1995. This brief in opposition is filed in response to the petition on behalf of the County.

SUMMARY OF ARGUMENT

1. No conflict exists between the decision sought to be reviewed and the decision of the Supreme Court of Connecticut in *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981). In *Griswold Inn,* the court held a statute prohibiting the sale of alcohol on Good Friday unconstitutional under the establishment clause. Good Friday was identified in *Griswold Inn* as a religious holy day characterized by solemn sectarian observance without any secular tradition. On the other hand, the Christmas alcohol sales ban upheld below by the First District involves a day long recognized as having a secular tradition wholly removed from its sectarian origins. The restrictive regulation on its face does not disclose any unconstitutional purpose.

2. The First District correctly articulated the establishment clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The First District properly applied the *Lemon* test in light of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), wherein the Court found Christmas to be a day long observed as a secular holiday. No special and important reasons exist for the Court to revisit *Lemon* or to review its application to the Christmas alcohol sales ban sustained below.

3. The Petitioners failed to raise any semblance of an equal protection challenge to the alcohol sales ban in the trial court or before the First District. Hence the certiorari jurisdiction of this Court under 28 U.S.C. § 1257 cannot lie as a matter of law.

4. The equal protection challenge raised by the Petitioners for the first time in this Court is misplaced. The

proper equal protection test for restrictive legislation in the area of economics and social welfare is that it be rationally based and free from invidious discrimination. *Dandridge v. Williams*, 397 U.S. 471 (1970). The alcohol sales ban considered below does not violate the equal protection clause under this test. This Court has previously upheld the constitutionality of a blue law prohibiting the sale on Sunday of certain commodities, including alcoholic beverages, against an equal protection challenge. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). With particular regard to restrictive regulations on the sale of alcoholic beverages, the Twenty-first Amendment provides even greater power to the regulating authority in matters that might otherwise be protected under the Constitution. The Petitioners' untimely equal protection challenge is merely a repackaging of their establishment clause claim.

REASONS THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE SUPREME COURT OF CONNECTICUT IN *GRISWOLD INN, INC. V. STATE OF CONNECTICUT*, 183 CONN. 552, 441 A.2D 16 (CONN. 1981), WITHIN THE MEANING OF RULE 10.1(B), RULES OF THE SUPREME COURT.

The Petitioners assert that the decision below conflicts with the decision of the Supreme Court of Connecticut in *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981), on the same federal question. Because both decisions are from state courts of last resort, the Petitioners reason that Rule 10.1(b) provides an express reason for this Court to exercise its discretion under 28 U.S.C. § 1257 and issue a writ of certiorari. A careful

analysis of the two decisions, however, reveals no conflict. Therefore, no jurisdictional vehicle exists under 28 U.S.C. § 1257 for the Court to issue such a writ.

In *Griswold Inn*, the court struck down a state law prohibiting the sale of alcohol on Good Friday as unconstitutional under the federal establishment clause. Here, the First District upheld the validity of a county ordinance prohibiting the sale of alcohol on Christmas against an establishment clause challenge. By a simplistic and analytically superficial deduction the Petitioners urge the Court to conclude that the decisions conflict. An examination of similarities is entirely appropriate to a conflict analysis, but in the cases of *Griswold Inn* and *Silver Rose Entertainment*, any salient similarity ends with the alcohol sales prohibition common to both. For Rule 10.1(b) to provide a vehicle for jurisdiction, there must be a fundamental conflict. Here there is not.

Good conflict analysis requires searching for distinctions and systematically neutralizing them. The most obvious distinction between the two cases is that *Griswold Inn* reviewed a Good Friday alcohol sales ban while *Silver Rose Entertainment* examined a Christmas alcohol sales ban. The Petitioners would obscure this distinction by use of a large ecclesiastical calendar on which Christmas and Good Friday are circled prominently. The Petitioners thus submerge the decisive distinction between Good Friday and Christmas beneath a simplistic reduction by which the two are rendered undifferentiated peas in a constitutional pod.

This Court has been at considerable pains to carefully study Christmas and to identify it as a holiday of secular significance wholly independent of its sectarian origins. In

Lynch v. Donnelly, 465 U.S. 668 (1984), this Court concluded that a Christmas display in the heart of the Pawtucket, Rhode Island, shopping district that included a crèche and other symbols associated with Christian religions did not violate the establishment clause. The Court specifically recalled the history by which the federal government had overtly recognized and observed Thanksgiving and Christmas as national holidays, even though they grew out of and still retain sectarian significance, stating, "Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance." *Id.* at 676.

In *Lynch* the Court undertook a lengthy discourse illustrating the pervasiveness of sectarian influences on secular institutions, emphasizing certain national traditions linked historically to religious holidays and observances. *Id.* at 673-78. Paying particular attention to the status of Christmas under the establishment clause the Court observed, "The city, like the Congresses and Presidents . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680-81. Chief Justice Burger summarized this important decision:

> To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be stilted overreaction contrary to our history and to our holdings. If

> the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution. *Id.* at 686.

Although she joined the majority in *Lynch*, Justice O'Connor also concurred separately and observed regarding Christmas, "The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood." *Id.* at 692.

In stark contrast, this Court has never examined the status of Good Friday under the establishment clause, nor suggested in any way that it has a secular tradition. The Petitioners' assertion that the sustaining of the Christmas alcohol sales ban in *Silver Rose Entertainment* conflicts with the striking of a Good Friday alcohol sales ban in *Griswold Inn* defies the distinction expressly articulated by the Connecticut Supreme Court in the latter case, in which it recognized "the traditional Christian significance of Good Friday and Christian exhortation to fast and abstain on that day in mourning for the death of Christ . . . ." *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. at ___, 441 A.2d at 20. Concluding that the purpose of the alcohol sales prohibition was to promote fasting and abstinence, the *Griswold Inn* court emphasized, "Moreover, the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins. . . . [T]here is no doubt that Good Friday lacks widespread public popularity or

acceptance as a secular holiday." *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. at ___, 441 A.2d at 21.

In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *pet. for reh'g denied and sugg. for reh'g en banc rejected*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. ___, 112 S.Ct. 3027 (1992), the Ninth Circuit Court of Appeals sustained a Hawaiian statute declaring Good Friday to be a paid legal holiday for state employees against an establishment clause challenge. The most interesting aspect of *Cammack* is Judge Nelson's lengthy dissenting opinion in which he expressly distinguishes Christmas, as both a secular holiday and a religious holy day, from Good Friday, singularly a religious holy day. Judge Nelson summarized his views thus:

> [P]eople of many religions or of no religion at all celebrate Thanksgiving and even Christmas, but it would be difficult to find atheists, Jews, or Baha'is engaging in Good Friday commemorations. Christmas, indeed, may be seen as a whole season, which the man who is perhaps its greatest secularizer described as "a good time; a kind, forgiving, charitable, pleasant time; the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely, and to think of people below them as if they really were fellow-passengers to the grave, and not another race of creatures bound on other journeys." Dickens, *A Christmas Carol* 8-9 (Bantam ed. 1986). To say that such an ecumenical spirit pervades Good Friday is

> simply untenable. I must agree that there is no evidence that "the Christian holy day of Good Friday has become secularized in any degree during the course of its longtime observance by Christian sects." *Cammack v. Waihee*, 932 F.2d at 790 (citations omitted).

Subsequent to the original panel decision of the Ninth Circuit Court of Appeals in *Cammack*, a petition for rehearing was denied by the panel and a suggestion for rehearing en banc was rejected by the full court. This result was reported in *Cammack v. Waihee*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. ___, 112 S.Ct. 3027 (1992). Five members of the full court dissented from the rehearing en banc rejection order. The dissenters observed:

> Good Friday is a wholly sectarian holiday. By contrast with Sunday, Thanksgiving, and Christmas—each of which has come to have secular significance—there is no recognizable secular tradition surrounding Good Friday. While non-believers may associate Sundays with recreation, Thanksgiving with eating turkey, and Christmas with sending and receiving gifts and greeting cards, one is hard-pressed to come up with any analogous practices associated with Good Friday. Good Friday connotes the Crucifixion—and nothing else. *Cammack v. Waihee*, 944 F.2d at 470.

The analysis utilized by the majority in *Griswold Inn* and by the dissenters in the two *Cammack* decisions cogently illustrates the historical distinction between Christmas as a secular holiday and Good Friday, always the sectarian holy

day. Against this jurisprudential backdrop, the Petitioners suggest another syllogism. By associating Easter with certain symbols and a tradition, the Petitioners assert that Easter must be observed as a secular holiday. Assuming that such an inference is sound, the Petitioners would extend the association to Good Friday for their crucial deduction that Good Friday is also a secular holiday. The fallacy is that in *Griswold Inn*, the decision asserted to be in conflict with that of the First District, Good Friday was specifically determined to be a solemn religious holy day lacking any secular holiday tradition. *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. at ___, 441 A.2d at 21. Therefore, the Petitioners' syllogism fails and *Griswold Inn* presents no conflict with the First District's decision sustaining the Christmas alcohol sales ban.

II. THE SUPREME COURT SHOULD DECLINE TO GRANT A PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW THAT PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON CHRISTMAS DOES NOT ON ITS FACE VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

As a result of the parties' stipulation that the First District render a final decision on the merits of the Petitioners' constitutional challenge, the Petitioners waived any right to return to the trial court and create a further record. The stipulation effectively narrowed the controversy to whether the alcohol sales ban on its face violates the establishment clause. *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 248, (P.A. at 17-18). This Court's review would of necessity be limited to the same facial inquiry.

The modern establishment clause test was first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In 1988, this Court reaffirmed the *Lemon* test in *Bowen v. Hendrick*, 487 U.S. 589 (1988). In *Bowen*, Chief Justice Rehnquist restated the *Lemon* three part test:

> As in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in Lemon v. Kurtzman. Under the Lemon standard . . . a court may invalidate a statute only if it is motivated *wholly* by an impermissible purpose, if its *primary* effect is the advancement of religion, or if it requires *excessive* entanglement between church and state . . . . *Id.* at 602 (citations omitted) (emphasis added).

The First District correctly cited *Lemon* for the proper analytical framework, *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 250-51, (P.A. at A-27), and then applied the purpose, effect and entanglement components thereof to the facial elements of the Christmas alcohol sales ban before concluding that the regulation was valid on its face. *Id.* at 252-53, (P.A. at A-31-35). Although the County's regulation is silent as to purpose, the First District inferred two legitimate purposes not offensive to the establishment clause: the "encourage[ment of] a respite from work, making family activity on Christmas Day possible" and the "discourage[ment of] consumption of alcohol on Christmas." *Id.* at 252, (P.A. at A-31-32). Contrary to the Petitioners' unsupported assertion that "abstention from alcohol is an important practice on [Christmas] for certain

Christian denominations" (petition at 14), the First District stated, "[W]e are unable to discern any religious principle that the ordinance under challenge endorses. We are aware of no religious sect that advocates nor any religious teaching to the effect that alcohol should be consumed or be readily available on every day of the year other than Christmas." *Id.*, (P.A. at A-34).

The County submits further that no sectarian denomination, Christian or otherwise, teaches or requires abstention from the consumption or sale of alcohol on Christmas in particular. Moreover, the alcohol sales ban does not prohibit the consumption of alcohol on Christmas, as noted by the First District. *Id.*, footnote 5, (P.A. at A-33).

The writ of certiorari being discretionary under Rule 10, this Court has expressed its disdain for exercising such discretion unless special and important reasons exist. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). The establishment clause standard applicable to this case has been clearly expressed since 1971 in *Lemon*, and has survived the test of time as reflected in *Bowen* in 1988. The First District correctly enunciated the test, thus presenting no occasion for this Court to rectify an errant articulation. The First District's application of that test in its facial review of the County's regulation was correct. Therefore, the Court's issuance of a writ of certiorari would provide no opportunity for the Court to visit an important federal question previously not considered by it. Review could only serve the purpose of providing the Petitioners with a fourth forum for considering an issue which is of specific concern to them as litigants, a purpose unsuited for certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. at 74.

III. THE EQUAL PROTECTION ISSUE ASSERTED BY THE PETITIONERS WAS NOT TIMELY AND PROPERLY RAISED SO AS TO GIVE THE SUPREME COURT A JURISDICTIONAL BASIS TO REVIEW BY A WRIT OF CERTIORARI ANY PUTATIVE EQUAL PROTECTION ASPECTS OF THE DECISION BELOW.

The Petitioners' pleadings in the trial court consisted of their complaint (R.A. at A-1) and verified motion for temporary injunction and memorandum of law (R.A. at A-7). A thorough dissection of these pleadings reveals no articulated claims that a Christmas alcohol sales ban violates the equal protection clause of the Fourteenth Amendment. Likewise, no reference to equal protection can be found in the trial court's order denying the motion for temporary injunction (P.A. at A-1).

The First District expressly rejected the Petitioners' assertion that the decision of the Florida Supreme Court in *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1960), compelled the invalidation of the alcohol sales ban. The First District quoted from the Petitioners' brief submitted below and observed:

> Appellants contend that "the Florida Supreme Court appears to have held that any statute premised upon the requirement that a business close on Sunday, Christmas, or any other religious days is unconstitutional as abridging the separation of Church and State Doctrine." Initial Brief, at 17. We do not read the decision in *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1960), on which appellants rely,

> for such a broad proposition. *Silver Rose Entertainment*, 646 So. 2d at 249, (P.A. at A-21) (footnote omitted).

In response to the Petitioners' misapprehension that *Moore v. Thompson* was decided on establishment clause grounds, the First District distinguished it as a case that "rested on notions of equal protection." *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 249, (P.A. at A-22). Further on, the First District observed, "Subsequent case law has confirmed the essentially 'equal protection' basis for the court's decision in *Moore*." *Id.* at 250, (P.A. at A-25).

Upon careful scrutiny, it cannot be said that the First District even decided a putative equal protection question which would provide this Court a basis to exercise its discretionary jurisdiction. In distinguishing *Moore v. Thompson*, the passing observation by the First District regarding the absence of any cases holding a regulation applicable to alcoholic beverage licensees as violative of equal protection cannot equate to a definitive ruling on a federal question. To invoke federal question jurisdiction under 28 U.S.C. § 1257, the rule of this Court is that the federal question must have been decided in the state court, and that such decision was necessary for the determination of the case. *Honeyman v. Hanan*, 300 U.S. 14 (1937).

It is apparent from the record that no equal protection challenge was ever asserted by the Petitioners before either the trial court or the First District. No decision was rendered on an equal protection question, nor was such a decision necessary for the determination of the case. This Court has ruled that its discretionary jurisdiction under 28 U.S.C. § 1257 does not lie unless the federal question presented to it

was timely and properly raised below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Therefore, this Court's discretionary jurisdiction should not be invoked.

IV. THE SUPREME COURT SHOULD DECLINE TO GRANT A PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW WHICH THE PETITIONERS INCORRECTLY ASSERT TO HAVE ERRONEOUSLY SUSTAINED THE COUNTY'S CHRISTMAS ALCOHOL SALES BAN AS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Despite having never raised an equal protection issue below the Petitioners now assert that a Christmas alcohol sales ban is unconstitutional on this new ground. The Petitioners claim that the alcoholic beverage licensee class of which they are a part is unconstitutionally discriminated against because businesses outside their class are not subject to the County's regulation. The Petitioners' untimely claim is unavailing and should not serve as a basis for this Court's discretionary jurisdiction under 28 U.S.C. § 1257.

In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court held that in the economic and social arena equal protection only requires that a regulation "be rationally based and free from invidious discrimination." *Id.* at 487. The Court allowed the regulating authority great latitude under this equal protection standard, stating:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v Natural Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S Ct 337. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v City of Chicago, 228 US 61, 69–70, 57 L Ed 730, 734, 33 S Ct 441. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v Maryland, 366 US 420, 426, 6 L Ed 2d 393, 399, 81 S Ct 1101. *Dandridge v. Williams*, 397 U.S. at 485.

This Court has characterized the *Dandridge* rational-basis scrutiny as "the most relaxed and tolerant form of scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

In *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), a companion case to *McGowan v. Maryland*, 366 U.S. 420 (1961), cited in *Dandridge v. Williams*, this Court considered and sustained the constitutionality of the Pennsylvania Sunday blue laws specifically against an equal protection challenge. There the commodities for which Sunday sales were prohibited included alcoholic beverages. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. at 587. The Court also rejected the same argument raised here by the

Petitioners (petition at 21-22) that the disparate impact of the regulations, which affected some businesses but not others, violates equal protection. *Id.* at 589-92. *See McGowan v. Maryland*, 366 U.S. 420 (1961).

In the decision below the First District examined the face of the regulation banning alcohol sales on Christmas, which is silent as to purpose, and observed, "One apparent purpose is to encourage a respite from work, making family activity on Christmas Day possible. . . . [T]he ordinance evinces another apparent purpose: To discourage consumption of alcohol on Christmas." *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 252, (P.A. at A-31, 32). The trial court found purpose for the ban both in the protection of the traveling public at a deadly time of the year from the standpoint of highway safety (P.A. at A-8-9), and in the recognition that, Christmas being a traditional time for family gathering and alcohol often serving as an accelerant to domestic violence, tranquillity and order within the family gathering could be served by discouraging the consumption of alcohol (P.A. at A-9).

In the more specific economic and social regulatory arena of alcoholic beverage sales, this Court has determined that the Twenty-first Amendment to the Constitution of the United States provides even greater authority for regulation in areas which might otherwise be protected under the Constitution. In *California v. La Rue*, 409 U.S. 109 (1972), the Court upheld regulations prohibiting, among other things, nude dancing in places licensed for the sale of alcoholic beverages for on-premises consumption. Quoting from an earlier decision of the Court, Justice Rehnquist for the majority reaffirmed that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the

Fourteenth." *California v. La Rue*, 409 U.S. at 115 (quoting *State Board v. Young's Market Co.*, 299 U.S. 59, 64 (1936)).

The Court acknowledged that, but for the Twenty-first Amendment, some of the proscribed conduct might be protected under the Constitution. *California v. La Rue*, 409 U.S. at 118. Upholding the regulations nevertheless, the Court concluded, "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.* at 118-19 (footnote omitted). *See also New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981).

The Petitioners' argument that a Christmas alcohol sales ban violates equal protection is merely an attempt to repackage their establishment clause claim under another constitutional label. *See Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 9 Fla. L. Weekly Fed. D55 (M.D. Fla., May 12, 1995); *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994). Both claims are functionally cognate under the circumstances presented here, for the establishment clause test applicable under *Lemon* subsumes the notion that government must not exercise its power in a manner which by its purpose or effect imposes the religious observance practices or traditions of a particular sectarian class on other sectarian or non-sectarian classes.

In the event a federal question under equal protection is deemed to have been timely and properly raised below so as to provide this Court a jurisdictional basis to review the same, the Court should decline to issue a writ of certiorari to consider equal protection. The jurisprudence of the Court is well-established and stable regarding equal protection and

regulation in the economic and social arena and need not be unduly disturbed.

The Twenty-first Amendment provides even greater authority in the regulation of alcoholic beverage sales as against an equal protection challenge. Consideration of the First District's decision below would provide the Court no opportunity to examine an equal protection question not previously answered by it. Special or important reasons do not exist which would justify this Court's exercise of its discretionary jurisdiction under 28 U.S.C. § 1257 to revisit equal protection or Twenty-first Amendment jurisprudence undisturbed by the First District's decision below. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

CONCLUSION

For the foregoing reasons this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

MARK H. SCRUBY
County Attorney
Counsel of Record

Post Office Box 1366
Green Cove Springs, FL 32043
(904) 269-6377

Attorney for Respondent
Clay County

Respondent's Appendix

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT IN, AND FOR CLAY COUNTY, FLORIDA

CASE NUMBER: 93-2425 CA

DIVISION: A

SILVER ROSE ENTERTAINMENT, INC., a Florida corporation, SUNSHINE FOOD MART, a Florida proprietorship, DALE'S PACKAGE STORE AND LOUNGE, INC. a Florida corporation, KELLY NAIL INC., a Florida corporation, WARD CASTENADA INC., a Florida corporation, HARRY'S OF ORANGE PARK, INC., a Florida corporation, VARSITY CLUB, INC., a Florida corporation, FLYNN RESTAURANTS, LTD., an Iowa corporation, and 57 HEAVEN

Plaintiffs,

vs.

CLAY COUNTY, a political subdivision of the State of Florida, and SCOTT LANCASTER, as Sheriff of Clay County,

Defendants.

COMPLAINT

Plaintiffs, SILVER ROSE ENTERTAINMENT, INC., a Florida corporation, SUNSHINE FOOD MART, a Florida proprietorship, DALE'S PACKAGE STORE AND

LOUNGE, INC. a Florida corporation, KELLY NAIL, INC., a Florida corporation, WARD CASTENADA, INC., a Florida corporation, HARRY'S OF ORANGE PARK, INC., a Florida corporation, VARSITY CLUB, INC., a Florida corporation, FLYNN RESTAURANTS, INC., an Iowa corporation, and 57 HEAVEN by and through their undersigned counsel, sue the Defendants, CLAY COUNTY, a political subdivision of the State of Florida, and SCOTT LANCASTER, as Sheriff, and states as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are all authorized to do business and are doing business in Florida and in Clay County, and are the owners of establishments licensed to sell alcoholic beverages in and all have their principal place of business located in the unincorporated areas of Clay County, Florida.

2. The Defendant, Clay County, is a political subdivision of the State of Florida. The Defendant, SCOTT LANCASTER (hereinafter called "Sheriff"), is the Sheriff of Clay County.

3. Clay County has by provisions of the Clay County Code undertaken to regulate the hours for the sale, consumption and service of all alcoholic beverages in all establishments licensed by the State. The part of the Clay County Code pertinent to this action is contained in Chapter 3, Clay County Code, Section 3-2. See Exhibit "A", attached hereto.

Section 3-2(c), Clay County Code, provides:

> "An exception to the above stated hours of sale shall be that no alcoholic beverage shall be sold on Christmas day until the regular authorized opening sale time on December 26th. The intention of this subsection is that no alcoholic beverages be sold during Christmas day and Christmas night of each year."

As a result of Section 3-2, Clay County has banned the sale of alcoholic beverages on Christmas day only, forcing the Sheriff of Clay County to monitor alcoholic beverage sales on Christmas Day and, in effect, force the observance of a religious holiday by liquor licensees.

COUNT I
TEMPORARY AND PERMANENT JURISDICTION

3. Plaintiffs reincorporate and reallege paragraph one (1) through three (3) above as if set forth in full.

4. This is an action for temporary and permanent injunctive relief.

5. The Plaintiffs are and have been establishments licensed by the State of Florida to sell alcoholic beverages and are therefore subject to the effect of Section 3-2, Clay County Code.

6. The function of the Sheriff, as provided by the subject ordinance, is the enforcement of Section 3-2 of the Clay County Code.

7. Section 3-2 of the Clay County Code is unconstitutional and violates the establishment clause of the First and Fourteenth Amendments of the United States Constitution and violates Article 1, Section 3, of the Florida Constitution, in that the statute advances religion in general, and particularly the Christian religion, but does not reflect a clearly secular legislative purpose and therefore results in entanglement between religion and state.

8. If the Defendants are not enjoined from the enforcement of Section 3-2, Clay County Code, the Plaintiffs will be deprived of the privilege of selling alcoholic beverages on Christmas in violation of their rights and will suffer harm which cannot adequately be quantified or remedied by an action at law in that Plaintiffs will lose revenue from being forced to close on Christmas (a Saturday) and Plaintiffs will be subject to revocation of its liquor license, and Plaintiff's will be subject to a fine or imprisonment of its principals and/or employees, if liquor is served on Christmas.

WHEREFORE, the Plaintiffs pray this Honorable Court will enter its judgement temporarily and permanently enjoining Clay County and the Sheriff from prohibiting the entertainment of Section 3-2 Clay County Code banning the Christmas sale, consumption and service of alcoholic beverages on Christmas Day for which Plaintiffs are licensed in the State of Florida, together which with such other relief as the Court deems proper.

COUNT II
DECLARATORY JUDGMENT

9. Plaintiffs reincorporate and reallege paragraph one (1) through three (3) above as if set forth in full.

10. This is an action for declaratory relief pursuant to Chapter 86, Florida Statutes, 1993.

11. Section 3-2 of the Clay County Code is unconstitutional and violates the establishment clause of the First and Fourteenth Amendments of the United States Constitution and violates Article 1, Section 3, of the Florida Constitution, in that the statute advances religion in general, and particularly the Christian religion, but does not reflect a clearly secular legislative purpose and therefore results in entanglement between religion and state.

12. Through the effect of Section 3-2, Clay County Code, Plaintiffs will be deprived of the privilege of selling alcoholic beverages on Christmas Day in violation of their rights. As such, there exists an actual and bona fide controversy over the constitutionality of Sections 3-2, Clay County Code.

13. Plaintiffs are in doubt about its rights to serve alcoholic beverages on Christmas Day and requests a determination as to the constitutionality of Section 3-2, Clay County Code.

14. Because Plaintiffs' doubt as to whether Section 3-2, Clay County Code, is constitutional, Plaintiffs are therefore in doubt as to whether it can lawfully sell alcoholic beverages on Christmas Day. If Plaintiffs, do not sell

alcoholic beverages on Christmas Day then Plaintiffs will lose revenue from being forced to close on Christmas Day (a Saturday) and if Plaintiffs sell alcoholic beverages on Christmas Day they may be subject to revocation of its liquor license, a fine or imprisonment of its principals and/or employees.

15. Plaintiffs have retained the undersigned counsel to bring this action to obtain a judicial determination of the constitutionality of Section 3-2, Clay County Code, and has obligated itself to pay a reasonable attorney fee.

WHEREFORE, the Plaintiffs pray this Honorable Court will enter its judgment declaring Section 3-2 of the Clay County Code to be unconstitutional, together which with such other relief the Court deems proper.

MARKS, GRAY, CONROY, & GIBBS, P.A.

/s/ Stephen C. Bullock
Stephen C. Bullock, Esquire
Florida Bar No.: 0347264
William K. Thames, II, Esquire
Florida Bar No.: 856118
Post Office Box 447
Jacksonville, FL 32201
(904) 398-0900

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT IN, AND FOR CLAY COUNTY, FLORIDA

CASE NUMBER: 93-2425 CA

DIVISION: A

SILVER ROSE ENTERTAINMENT, INC., a Florida corporation, et. al

Plaintiffs,

vs.

CLAY COUNTY, a political subdivision of the State of Florida, and SCOTT LANCASTER, as Sheriff of Clay County,

Defendants.

VERIFIED MOTION FOR TEMPORARY INJUNCTION AND MEMORANDUM OF LAW

Plaintiffs, by and through their undersigned counsel and pursuant to Rule 1.610, Florida Rules of Civil Procedure, moves this Court for a temporary injunction enjoining the Defendants from enforcing Section 3-2(c), Clay County Code, which prohibits the sale of alcoholic beverages on Christmas Day. As grounds for said motion, Plaintiffs state as follows:

FACTS

Section 3-2(c), Clay County Code, provides:

> "An exception to the above stated hours of sale shall be that no alcoholic beverage shall be sold on Christmas day until the regular authorized opening sale time on December 26th. The intention of this subsection is that no alcoholic beverages be sold during Christmas day and Christmas night of each year."

See Exhibit "A", attached hereto. As a result of Section 3-2, Clay County has banned the sale of alcoholic beverages on Christmas day only, forcing the Sheriff of Clay County to monitor alcoholic beverage sales on Christmas day and in effect, force the observance of a religious holiday by liquor licensees.

Plaintiffs are and have been, owners of various business establishments properly licensed by the State of Florida to sell alcoholic beverages and is therefore subject to the effect of Section 3-2, Clay County Code. The function of the Sheriff of Clay County is to enforce all ordinances in Clay County, including the enforcement of Section 3-2 of the Clay County Code.

Section 3-2 of the Clay County Code is unconstitutional and violates the establishment clause of the First and Fourteenth Amendments of the United States Constitution and violates Article I, Section 3, of the Florida

Constitution, in that the Section 3-2 advances religion in general and particularly the Christian religion, and does not reflect a clearly secular legislative purpose. Hence, the effect of Section 3-2 of the Clay County Code results in entanglement between religion and state.

It is obvious on the face of Section 3-2, Clay County Code, that the overall intent of the legislative enactment is to advance the Christian religion to the exclusion of other religions. If the Defendants are not enjoined from the enforcement of Section 3-2, Clay County Code, Plaintiffs will be deprived of their privilege of selling alcoholic beverages on Christmas in violation of their rights and will suffer irreparable harm which cannot adequately be quantified or remedied by an action at law since Plaintiffs will lose revenue from being forced to close on Christmas Day (a Saturday) and Plaintiffs will be subject to imprisonment of its principals and/or employees, fine and/or license revocation if it sells alcoholic beverages on Christmas Day.

LAW

There is a substantial likelihood that Plaintiffs will prevail on the merits of this case. Although there are no Florida cases directly on point addressing the constitutionality of county ordinances prohibiting the sale of alcoholic beverages on religious holidays, the exact same issue has been recently addressed by the Supreme Court of Connecticut in Griswold Inn, Inc. v. State of Connecticut, 441 A.2d 16, (1981). In Griswold, the Supreme Court of Connecticut dealt with the exact same issue of whether a statute can prohibit the sale of alcoholic beverages on a religious holiday, namely, Good Friday. The Griswold Court

held that the statute in question violated the establishment clause of the United States Constitution and the Establishment Clause of the Connecticut Constitution. In reaching its conclusion, the Griswold Court noted that the United States Supreme Court had set forth a three-part test to determine whether a law violated the establishment clause.

> "To pass muster under the establishment clause the law in question, first must reflect a clearly secular legislative purpose, second, have a primary effect that neither advances or inhibits religion, and third, must avoid excessive governmental entanglement with religion." Committee for Public Education v. Nyquist, 413 US 756, 772, 773, 93 S. Ct. 2955, 2965-66, 37 L. Ed. 2d 948 (1973). If a legislative enactment fails any one part of the test, it must fall. Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed.2d 199 (1980). Id at 18.

As for the first prong of the test, the Griswold Court found that no clear secular purpose justified prohibition of liquor sales on Good Friday. The Griswold Court noted that although the state contended that the purpose of the legislation was to prohibit the sale of liquor on a holiday which enjoys state wide celebration, plain reading of the statute showed that it could not be the true legislative intent.

> "Had the legislature been concerned with celebrating a secular holiday, it would have prohibited the sale of alcohol on other holidays. Given the traditional significance of Good Friday and Christian exhortation to fast and abstain on that day in mourning for the death of Christ, the singling out of Good Friday reveals that there is no clear secular purpose which justifies the prohibition of liquor sales on this day." Id.

Therefore, the statute prohibiting the sale of alcohol on Good Friday failed the first part of the test.

The statue likewise failed the second prong of the test, since the primary effect of the statute prohibition of liquor sales on Good Friday was to advance religion. The Court noted that the Good Friday prohibition advanced religion in general and in particular the Christian religion by preventing the sale and drinking of liquor on only one day a year, Good Friday, a religious holiday for Christians. The Griswold Court noted that impermissible effects of the law were two-fold. First, the existence of that legal prohibition on this major Christian religious holiday gave the state's clear stamp of approval to both the Christian rights and practices observed on that day and to Christianity in general. Id at 17. Second, beyond merely indicating state approval of Christian Good Friday rites, the law imposed their observance on both

Christians and non-Christians alike since licensees such as the Plaintiffs, are subject to revocation their liquor licenses, a fine or imprisonment if liquor is served on that day. Id. Thus, the primary effect of the Good Friday prohibition was an endorsement of the Protestant and Catholic faiths.

The Griswold Court further rejected the Defendant's argument that the primary effect of the Good Friday prohibition was to promote traffic safety and encourage safety on recreational holidays on a date celebrated as a state-wide holiday. Id. However, the Court noted that facts did not indicate that Good Friday presented any special problems and that any problem with alcohol abuse on that day is at most speculative and incidental to the primary religious impact. Id.

Finally, with regard to the third prong of the test, the Griswold Court noted that the Good Friday prohibition required excessive and impermissible entanglement of government with religion. First, the statute required an impermissible degree of inspection or monitoring of religious practices since the state must monitor the sale of alcohol on Good Friday, since the state must monitor and enforce the observance of a religious holiday by liquor licensees in order to enforce the statute. Id. at 18. Second, the Good Friday prohibition endangered political entanglement with religion by creating political divisions and debate along religious lines. Id. The Court noted that debates over the propriety of the Good Frida prohibition encouraged division along religious lines with religious institutions and practicing Christians being pitted against non-Christians and non-religious persons. It is this sort of fragmentation along religious line which is one of the principal evils against which the establishment clause was intended to protect Id.

Since the Good Friday prohibition statute satisfied non of the three (3) prongs of the test enunciated by the United States Supreme Court in Nyquist, supra, for determining when a state had overstepped the limits of neutrality in religious matters, Good Friday prohibition statute clearly violated the establishment clause and was unconstitutional.

The instant case presents an identical situation. Section 3-2, Clay County Code, specifically states that it is "the intention of this subsection that no alcoholic beverages be sold during Christmas day and Christmas night of each year". **The ordinance does not prohibit alcoholic beverage sales on any other holiday.** Clearly, the intent of the ordinance is to promote the observance of a Christian religious holiday in clear violation of the establishment clause of the United States Constitution as well as Article 1, Section 3 of the Florida Constitution ("There shall be no law respecting the enforcement or establishment of religion . . .). Simply substitute "Christmas Day" for "Good Friday", and the entire opinion in Griswold, supra, can be adopted in its entirety to hold Section 3-2 of the Clay County Code unconstitutional.

There is judicial precedent in this jurisdiction for holding a local ordinance regulating the sale of alcoholic beverages as being unconstitutional although the factual circumstances were different. In City of Jacksonville v. C.J. Ventures, Inc., 558 So.2d 133 (Fla. 1st DCA 1990) the operator of a bar and restaurant in the City of Jacksonville Beach filed suit seeking temporary and permanent injunction against the City and the Sheriff regarding enforcement of an ordinance regulating the sale of alcoholic beverages on Sunday, on the basis that the ordinance violated due process by failing to provide the Sheriff with any criteria or standards

to determine compliance with the ordinance. The particular ordinance allowed only "bona fide restaurants" to serve alcoholic beverages on Sunday, such restaurants being defined as those deriving fifty-one per cent (51%) of their gross revenue from the sale of food and not alcoholic beverages and the principal business of the restaurant being to serve full course bona fide meals to the general public. The local Circuit Court Judge Bill Parsons, entered a temporary injunction against the Sheriff and the City of Jacksonville from enforcing the ordinance holding that the ordinance was unconstitutional since it violated due process provisions of the Fifth Amendment of the Constitution of the United States. On appeal, the First District Court of Appeal affirmed the injunction.

This Court should also note that only the unincorporated areas of Clay County are subject to the provisions of Section 3-2 of the Clay County Code. Specifically, Section 4-3 of Chapter 4 of the City of Orange Park Ordinances does not prohibit the sale of alcoholic beverages on Christmas Day. See Exhibit "B", attached hereto. Therefore, stores, restaurants, lounges and night clubs in the incorporated City of Orange Park are allowed to sell and serve alcoholic beverages and, hence, the City of Orange Park has revoked the Clay County Ordinance, Section 3-2. As a consequence, Section 3-2 of the Clay County Code is being applied arbitrarily and capriciously to those stores, lounges and restaurants in the unincorporated areas of Clay County. Further, in Duval County there is no prohibition against the sale of alcoholic beverages on Christmas Day. Therefore, since the unincorporated areas of Clay County are contiguous (and, in fact in between) Duval County and the City of Orange Park, Section 3-2 of the Clay County Code creates an arbitrary and capricious ban against the sale of

alcoholic beverages without any rational relationship to a legitimate legislative purpose.

WHEREFORE, Plaintiffs pray this Honorable Court will enter its judgement temporarily and permanently enjoining Clay County and the Sheriff from prohibiting the Christmas sale, consumption and service of alcoholic beverages for which the Plaintiff is licensed in the State of Florida, together which with such other relief as the Court deems proper.

DATED this 17th day of December, 1993.

MARKS, GRAY CONROY & GIBBS, P.A.

/s/ Stephen C. Bullock
Stephen C. Bullock, Esquire
Florida Bar No.: 0347264
William K. Thames, II, Esquire
Florida Bar No.: 856118
Post Office Box 447
Jacksonville, FL 32201
(904) 398-0900
Attorneys for Plaintiffs

VERIFICATION

The undersigned hereby verifies that immediate and irreparable injury, loss and/or damage will result to SILVER et al, if Section 3-2 of the Clay County Code is enforced on Christmas Day, December 25, 1993.

DATED this 17th day of December, 1993.

SILVER ROSE ENTERTAINMENT, INC.

By: /s/ Bernie H. Smith
BERNIE H. SMITH

/p/ Bernie H. Smith